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E.O. 12958: N/A  
TAGS: ECON ETRD JA  
SUBJECT: DEMARCHE REQUEST: SEEKING JAPANESE ENGAGEMENT IN  
TKS/GOSS DISPUTE

¶1. (U) This is an action request. Please see paras 6-10.

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BACKGROUND  
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¶2. (SBU) In 2003 Goss, a U.S. newspaper printing press manufacturer, was awarded \$31.6 million in a suit filed in federal district court against its Japanese competitor, Tokyo Kikai Seisakusho (TKS), under the 1916 Antidumping Act. This was the only instance in which a judgment was ever rendered under the antiquated law, which the World Trade Organization (WTO) had determined in 2000 to be inconsistent with U.S. WTO obligations. In 2004, Congress repealed the 1916 Act, but made its repeal prospective, so as not to affect the outcome of the Goss case. Goss's \$31.6 million judgment was ultimately upheld on appeal in 2006.

¶3. (SBU) Prior to the U.S. Congress's repeal of the 1916 Antidumping Act, the Japanese Diet in 2004 enacted a statute known as the "Special Measures Law." The law, a so-called "claw-back statute," was designed to allow Japanese companies such as TKS to recover the damages they had lost to American competitors in lawsuits under the 1916 Antidumping Act by suing their competitors in Japanese courts. In 2007, the U.S. Court of Appeals for the Eighth Circuit denied Goss's request for an injunction to prevent TKS from suing Goss in Japan under the Japanese claw-back statute. Shortly thereafter, TKS initiated a lawsuit under the Japanese "Special Measures Law" against a Goss subsidiary in Japan, seeking to recover the \$31.6 million it had lost to Goss in the United States. Goss then petitioned the U.S. Supreme Court to overturn the Court of Appeals decision denying Goss's request for an injunction. The Supreme Court solicited the opinion of the Solicitor General on whether it should consider the case, and the State Department participated in that process. The USG brief recommended on balance that the Supreme Court should not hear the case because, given its unusual facts, the case would not have broad significance. The Supreme Court in June 2008 rejected Goss's petition, effectively allowing the case in Japan under the Japanese claw-back statute to proceed.

¶4. (SBU) Now that it has no further possibility of remedy in U.S. courts, Goss has renewed assertions raised in 2004 that Japan has violated its obligations under the 1953 U.S.-Japan Treaty of Friendship, Commerce and Navigation (FCN) because of the Special Measures Law. Goss alleges violations of treaty obligations relating to national treatment, most-favored nation treatment, expropriation, and unreasonable/discriminatory treatment, and suggested that the Department consider taking the matter to the International Court of Justice as permitted (if consultations are unsuccessful) by the FCN Treaty. In September, L, EEB, and EAP met with Goss to discuss its FCN claims; L is currently reviewing the issues. Goss has also urged the Department to use diplomatic pressure to convince Japan to persuade TKS into settlement talks with Goss.

¶ 15. (SBU) There is Congressional support for Goss. In August, Assistant Senate Majority Leader Durbin and Senators Sununu, Collins, and Gregg sent a joint letter to Secretary Rice supporting Goss's FCN Treaty claims and asking that we keep them informed of our actions. (Note: Goss's headquarters are in Illinois, and it has a manufacturing plant in New Hampshire.) Also, on July 31, 2008 Senators Sununu and Gregg introduced legislation in the U.S. Senate that would allow Goss to sue TKS in U.S. courts to recover any damages that Goss or its subsidiary suffers in Japan under the Japanese claw-back statute. Prospects for passage of similar legislation in the next session of Congress are unclear at this time. More recently, in October Senator Sununu expressed his strong interest in this case in a telephone conversation with Under Secretary Jeffery, and requested that the State Department do more to assist Goss.

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ACTION REQUEST  
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¶ 16. (SBU) Embassy is requested to deliver a demarche to the Ministry of Economy, Trade, and Industry (METI) at the highest appropriate level no earlier than Wednesday, October 22 and no later than Friday, October 24 emphasizing the following objectives:

-- Stress the seriousness of U.S. Government concerns with respect to the implications of the on-going case under the Special Measures Law for Japan's obligations under the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan.

-- Discuss the strong level of Congressional interest in this issue, noting the potential for further litigation should legislation similar to S.3394 pass in the U.S. Congress.

-- Emphasize the U.S. Government's interest in avoiding an international dispute over this matter.

-- Noting Goss's desire to negotiate a settlement with TKS, request the Government of Japan's assistance in encouraging TKS to enter into settlement discussions with Goss.

(NOTE: The same message will be delivered by Under Secretary Jeffery to Japanese Ambassador to the United States Ichiro Fujisaki in Washington on Tuesday, October 21, 2008.)

¶ 17. (SBU) In delivering this message, Ambassador or DCM may draw from the following talking points (NOTE: Embassy is requested NOT to leave behind a hard copy of these points with the Government of Japan; a version of points that may be delivered in hard copy is provided in para 8):

BACKGROUND POINTS:

-- In 2004, the U.S. Government urged the Japanese government at senior levels not to proceed with approval of Law No. 162 on Special Measures Concerning the Obligation to Return Profits Obtained Pursuant to the United States Anti-Dumping Act of 1916.

-- Nonetheless, the Japanese government enacted the law in 2004. The text of that law, and statements made by the Japanese government at the time, demonstrate that it was specifically intended to benefit Japanese firm Tokyo Kikai Seisakusho (TKS), which was involved in a dispute with its U.S. competitor, Goss International.

-- TKS is currently pursuing a claim under this law in Japanese court against Goss International and Goss Japan, a subsidiary of Goss International. TKS seeks to "claw back," under the Special Measures Law, in excess of \$30 million that was awarded to Goss International in 2003 by a U.S. court in a case against TKS under the 1916 Act.

-- The court proceedings in the United States established

that TKS engaged in dumping of printing press machinery with the intent of destroying or injuring Goss International. A jury concluded that TKS had violated the 1916 Act and awarded damages of \$32 million to Goss International. That verdict was upheld on appeal. Because of the intentional dumping activity of TKS, which was found to have included a fraudulent price increase, secret anti-competitive rebates, and intentional destruction of evidence, Goss International suffered considerable injury.

-- ONLY IF RAISED: Our concern over the injury suffered by Goss is in no way diminished by the World Trade Organization (WTO) ruling in 2000 that the 1916 Act was inconsistent with certain provisions of the WTO Agreement. The United States repealed the 1916 Act in 2004, and it is the position of the U.S. Government that this action brought the United States into conformity with the recommendations and rulings of the WTO Dispute Settlement Body in this dispute.

#### U.S. CONCERNS WITH RESPECT TO JAPAN'S TREATY OBLIGATIONS:

-- The Special Measures Law raises serious concerns under the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan. We hope that the Government of Japan shares the interest of the U.S. Government in ensuring that our respective companies receive the protections to which they are entitled under that agreement. It would be in our governments' mutual interest to avoid international dispute settlement regarding this matter.

#### CONGRESSIONAL ACTION IN RESPONSE TO THE CLAWBACK:

-- Unless this matter is resolved, the U.S. Congress may act. As you may know, a bill (S.3394) has recently been introduced in the U.S. Senate that would authorize Goss International to recover, in U.S. court, damages from TKS in an amount commensurate with any judgment that might be rendered against Goss International and Goss Japan under the Special Measures Law. The result could be more litigation in U.S. courts. This legislation is motivated by the belief that it is fundamentally unfair to deprive Goss International of the damages that it was awarded by a U.S. court for the injury it suffered because of the intentional acts of TKS.

#### U.S. SUPPORT FOR PRIVATE SETTLEMENT OF THE DISPUTE:

-- Goss International has advised the U.S. Government that it continues to be interested in discussing with TKS a settlement of this matter. We hope that the Government of Japan shares the view of the United States that settlement of this matter would be in the best interests of all concerned. It would spare the time and expense of current and prospective litigation and would remove an irritant in our bilateral relations at a sensitive time, as a new U.S. administration will soon take office.

-- We therefore request the assistance of the Government of Japan in urging TKS to take action now to engage with Goss International to discuss these matters. We stand ready to work with your government to facilitate that process.

¶18. (SBU) In delivering the demarche, Embassy is requested to leave behind a copy of the following points as a non-paper:

-- In 2004, the U.S. Government urged the Japanese government at senior levels not to proceed with approval of Law No. 162 on Special Measures Concerning the Obligation to Return Profits Obtained Pursuant to the United States Anti-Dumping Act of 1916.

-- Nonetheless, the Japanese government enacted the law in 2004. The text of that law, and statements made by the Japanese government at the time, demonstrate that it was specifically intended to benefit Japanese firm Tokyo Kikai Seisakusho (TKS), which was involved in a dispute with its U.S. competitor, Goss International.

-- TKS is currently pursuing a claim under this law in

Japanese court against Goss International and Goss Japan, a subsidiary of Goss International. TKS seeks to "claw back", under the Special Measures Law, in excess of \$30 million that was awarded to Goss International in 2003 by a U.S. court in a case against TKS under the 1916 Act.

-- The court proceedings in the United States established that TKS engaged in dumping of printing press machinery with the intent of destroying or injuring Goss International. A jury concluded that TKS had violated the 1916 Act and awarded damages of \$32 million to Goss International. That verdict was upheld on appeal.

-- In considering this matter, including equitable considerations of fairness, it is important to keep certain factors in mind.

-- In upholding the jury verdict against TKS and denying TKS's motion for a new trial, the U.S. District Court for the Northern District of Iowa stated in its decision (copy attached), among other things, the following regarding the conduct of TKS:

"The jury further heard evidence at trial that TKS agreed to a fraudulent price increase and secret \$2.2 million rebate to keep the DMN (Dallas Morning News) from purchasing the two towers from Goss in 1996."

"The jury was also presented with evidence that TKS and its counsel engaged in a concerted effort to conceal the secret rebates."

" . . . Mr. Saito (TKS's counsel) . . . urged TKS (USA) to falsify its business records . . ."

"There was also evidence presented at trial that TKS and its counsel attempted to destroy documents to conceal the secret rebates."

"When TKS employees committed the secret rebate agreement with the DMN to a signed, written agreement, TKS executives Mr. Morimoto and Takehiro Fukuyama stated that 'there should not be such a document' and ordered that copies of the document 'must be collected and destroyed.'"

-- On the basis of information that was presented during the trial, the U.S. Department of Commerce reconsidered its prior administrative review determination of an antidumping duty order wherein TKS presented false information to the agency. The Commerce Department presently is reconsidering its prior "sunset" review determination, which resulted in revocation of the antidumping duty order.

-- As you may know, the U.S. Supreme Court recently declined to hear an appeal by Goss International of a ruling by the U.S. Court of Appeals for the Eighth Circuit that invalidated an antisuit injunction against TKS that had been issued by the district court. That injunction prevented TKS from proceeding with its lawsuit in Japan under the Special Measures Law.

-- In its amicus curiae brief to the Supreme Court (copy attached), the U.S. Department of Justice cited numerous errors by the court of appeals, including the deference that the court of appeals gave to the Special Measures Law under principles of comity:

"As a law specifically designed to overturn a final judgment entered by a court that clearly possessed jurisdiction and was implementing the law of its nation with respect to conduct and harm occurring within the territorial jurisdiction of that nation, the Special Measures Law is itself in considerable tension with general notions of international comity, and thus should not have received full weight in the comity analysis."

-- However, the Justice Department advised the Supreme Court that, on balance, in light of the unusual facts of the case, the likelihood that they would never recur, and the absence

of a serious split among the circuits, further review of the case by the Supreme Court was not warranted.

-- The Government of Japan should not misunderstand the recommendation made in that brief, however. It does not signify that the U.S. Government has acquiesced to the Special Measures Law or the ongoing litigation in Japanese court against Goss International and its Japanese subsidiary.

-- The Special Measures Law raises serious concerns under the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, including provisions that guarantee that the Government of Japan will treat U.S. investors in a reasonable and non-discriminatory fashion, and that require that the GOJ refrain from expropriation of the property of U.S. companies without just compensation. We hope that the Government of Japan shares the interest of the U.S. Government in ensuring that our respective companies receive the protections to which they are entitled under that agreement. It would be in our governments' mutual interest to avoid international dispute settlement regarding this matter.

-- Unless this matter is resolved, the U.S. Congress may act. As you may know, a bill (S.3394) has recently been introduced in the U.S. Senate that would authorize Goss International to seek to recover, in U.S. court, damages from TKS in an amount commensurate with any judgment that might be rendered against Goss International and Goss Japan under the Special Measures Law. The result could be more litigation in U.S. courts. This legislation is motivated by the belief that it is fundamentally unfair to deprive Goss International of the damages that it was awarded by a U.S. court for the injury it suffered because of the intentional acts of TKS.

-- Goss International has advised the U.S. Government that it is prepared to discuss with TKS a settlement of this matter.

-- A settlement would be in the best interests of all concerned. For one thing, we are worried about the implications of this case for our economic relationship at a sensitive time for both our governments. As you well know, a new President will take office in the United States next year; in order to maximize our bilateral engagement under the new administration, we would be well served to preemptively address irritants such as this case. In addition, a settlement would preclude the need for further litigation in domestic courts or international tribunals.

-- We therefore request the assistance of the Government of Japan in urging TKS to take action now to engage with Goss International to discuss these matters. We stand ready to work with your government to facilitate that process.

-- The first few months under our new U.S. President will be crucial in setting the tone for our bilateral economic engagement in the years ahead. We would like to keep relations on as positive a trajectory as possible.

¶9. (U) Embassy is also requested to provide, along with the non-paper points provided in para 8, the following documents, which have been sent via unclassified e-mail to Robert Cekuta, David DiGiovanna, and Chin Han-Quinlan: a) the District Court's decision in the case of Goss vs. TKS; and b) the brief of the U.S. Government to the Supreme Court concerning the case of Goss vs. TKS.

¶10. (U) Please report back the results of the demarche via front-channel cable no later than Monday, October 27.

¶11. (U) Department appreciates Embassy's assistance in this matter.

RICE